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No. 87-5840

In The

Supreme Court of the United States

October Term, 1988

EDWARD McNAMARA,

Appellant,

v.

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

I

Is it a denial of equal protection to terminate the parental rights of an unwed father who promptly manifested a significant parental interest in his child and would be a good parent solely because it is in the best interests of the child?

II

Is it a denial of equal protection to terminate the parental rights of an unwed father without a finding adverse to his parenting ability when (A) other fathers must be found to have no interest in or ability for parenting before they lose their rights, and (B) unwed mothers do not lose their rights under similar conditions?

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OPINIONS AND JUDGMENTS BELOW

The Judgment and Order Terminating Rights of a Father, filed February 26, 1982, J.S. 64a[1] was accompanied by a Memorandum Decision, filed February 9, 1982, J.A. 7, and a Statement of Decision, filed April 29, 1982, J.A. 10. The opinion of the Supreme Court of the State of California, reversing and remanding for further proceedings, with a dissent, was filed October 22, 1984. J.A. 12, J.S. 36a. It is reported at 37 Cal.3d 65, 207 Cal.Rptr. 309, 688 P.2d 918.

After further hearings, the superior court's statement of decision was stated on the record February 27, 1985, J.A. 22, and the Judgment Terminating the Rights of an Alleged Natural Father, Respondent Edward McNamara, was filed March 7, 1985. J.A. 26. On appeal, three opinions were filed April 30, 1987: The opinion of the court affirming, J.S. 1a; an opinion concurring, J.S. 15a; and a dissent, J.S. 24a. The opinions are reported in the

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[1] *Matters of Form.*

"C.T." refers to the Clerk's Transcript on appeal below.

"J.A." refers to the Joint Appendix.

"J.S." refers to the Jurisdictional Statement.

"R." refers to the certified record with references to the case number in the Court of Appeal. The first one was 26793, heard in the California Supreme Court as No. L.A. 31786, and the second was D003076.

"R.T." refers to the reporters' transcripts in the appeals, with reference to the case number.

"S.A." refers to the Statutory Appendix following the Brief for Appellant, starting at page 1b.

California Official Advance Sheets at 191 Cal.App.3d 786, and 236 Cal.Rptr. 660, but were ordered not to be published in the Official Reports, Cal. Rules of Court, rule 976. J.S. 69a.

JURISDICTION

The Judgment and Appeal

The judgment of the Supreme Court of the State of California, denying Appellant's timely petition for review, was filed July 30, 1987. J.S. 69a. A notice of appeal was filed October 22, 1987 in the Court of Appeal of the State of California, Fourth Appellate District, Division One. This appeal was docketed October 28, 1987, within 90 days of the judgment below. Jurisdiction was postponed April 18, 1988.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(2), or may apply 28 U.S.C. § 2103.

Jurisdictional Facts

At the first trial, the California trial court placed the burden of proof on appellant to prove that giving custody to him would be in the best interests of the child. J.A. 7-8. Appellant contended that he was entitled to the parental preference given to other parents, § 4600,[2] J.S.

[2] *Section citations.* All citations are to the California Civil Code unless otherwise noted.

70a: that he should get custody (thus becoming a presumed parent whose consent would be needed to adopt, § 7017(d)(2), J.S. 72a) unless it would be in the best interest of the child to give custody to a nonparent and detrimental to the child to give custody to him. R.26793, C.T. 18-20; 4th Civil No. 26793, Aplt. Open. Brf. 12-16.

He argued that he was entitled to that treatment under opinions of this Court construing and applying the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 4th Civil No. 26793, Aplt. Open. Brf. 12-14. Appellant did not specifically cite the provisions of that Amendment.

The California Supreme Court agreed. Construing the statute to include the parental preference, the court considered the relevant opinions of this Court and found the statute valid. J.S. 45a-48a.

The court specifically found that due process had been afforded. J.S. 47a. Going beyond, the court noted that this Court had not considered a similar factual situation involving a newborn surrendered for adoption, J.S. 45a, n. 8, nor the application of a best interest test requiring a finding of detriment from parental custody as a basis for terminating parental rights. J.S. 45a, n. 8, 47a. Further, the statute was found to protect adequately the opportunity of a father to develop a relationship with his child. J.S. 47a-48a. Consequently, there were no federal grounds to invalidate the statute as construed, nor to find a denial of equal protection.

Finding, however, that the record at trial did not support a finding of detriment *at that time*, J.S. 49a, emphasis original, the case was remanded for further

hearing as to subsequent events. J.S. 49a-50a. On remand, the trial court found that the child had been in the prospective adoptive parents' home so long that it would be detrimental to remove her and give custody to appellant. J.A. 23-24.

On appeal, appellant again urged the application of this Court's cases to his basic civil rights. 4th Civil No. D003076, Aplt. Open. Brf. 6. By letter to counsel, the Court of Appeal invited supplemental briefing by the parties on whether, under this Court's applications of the Fourteenth Amendment, J.A. 28-29, the County's "action may have unconstitutionally prevented Edward from developing his protected opportunity interest to establish a parenting relationship which would allow him to withhold consent to adoption." J.A. 28.

The County responded that the California Supreme Court had been "squarely presented" with the constitutional need for a finding of unfitness, 4th Civil No. D003076, Letter from County Counsel dated April 13, 1987, pp. 3-4, and "did *not* find a violation of appellant's constitutional rights." *Id.*, at p. 2, emphasis original. The Court of Appeal agreed and refused to reconsider the constitutional issues:

> "(E)xtensive citation to the Buchanan article. . .and federal precedent makes clear [the California Supreme Court] was aware of and considered the federal constitutional issues***preclud[ing] consideration of Edward's constitutional argument." J.S. 7a, n. 2.

Jurisdictional Argument

1. Appeal jurisdiction lies because the state court passed upon the statute and found it valid under the Fourteenth Amendment

The statute was found valid under the due process and equal protection standards established by this Court. J.S. 45a-48a. That invokes the Court's jurisdiction. *Clark v. Jeter*, No. 87-5565 (June 6, 1988), 56 U.S.L.W. 4527, 4528 (June 7, 1988).

Appeal jurisdiction lies where the state court has actually decided that a state statute as applied is not repugnant to the United States Constitution. *Charleston Fed. S. & L. Assn. v. Alderson*, 324 U.S. 182, 185-186 (1945); *Edwards v. Elliott*, 21 Wall. (88 U.S.) 532, 550-551 (1874); accord, *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 23 (1974); *Poulos v. New Hampshire*, 345 U.S. 395, 403 (1953).

Where the lower courts actually decide a federal question, it is irrelevant how or when it was raised. *Orr v. Orr*, 440 U.S. 268, 274-275 (1979); cf., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159, n. 5 (1980).

A fair reading of the opinions shows that the state courts relied on decisions of this Court under Fourteenth Amendment tests to uphold the validity of section 7017(d)(2). That allows this Court to reach the merits. Cf., *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *California v. Mitchell Bros' Santa Ana Theater*, 454 U.S. 90, 92 (1981). It is enough that the necessary effect of the judgment is to uphold the statute or to deny a constitutional claim, even if validity is not declared in direct terms. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

2. Certiorari jurisdiction lies because the courts below decided appellant was not denied equal protection

Alternatively, the Court has certiorari jurisdiction, 28 U.S.C. § 2103, because it was held that appellant had not been denied any constitutional rights. J.S. 45a-48a, 6a-7a, n. 2. Therefore, the appeal may be treated as a petition for a writ of certiorari and the merits decided. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. ___, ___, (1988), 56 U.S.L.W. 4418, 4420 (May 17, 1988) (probable jurisdiction noted); *Kulko v. Superior Court*, 436 U.S. 84, 90, n. 4 (1978) (jurisdiction postponed).

The California courts, on both appeals, realized federal constitutional issues were involved. Chapter and verse need not be cited. *Eddings v. Oklahoma*, 455 U.S. 104, 113-114, n. 9 (1982). Here there is no doubt. *Webb v. Webb*, 451 U.S. 493, 501 (1981); cf., *Bankers Life and Casualty Company v. Crenshaw, supra*, 56 U.S.L.W. at 4420; *Taylor v. Kentucky*, 436 U.S. 478, 482, n. 10 (1978).

The facts necessary to address the issues also are fully developed in the record. Therefore, no policy militates against considering the issues. *Bankers Life and Casualty Company v. Crenshaw, supra*, 56 U.S.L.W. at 4420-4421; *Illinois v. Gates*, 462 U.S. 213, 217-222 (1983).

3. The Court may review the California Supreme Court's constitutional rulings as well as the Court of Appeal's because the first appeal was not ripe for review

The California Supreme Court decision was not final and ripe for review here. The case was remanded for

further proceeding on state law. The application of the best interest/detriment test could have given rise to further federal issues.

The test of finality is whether the judgment is subject to further review; whether it is a final judgment of a final court. *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945); *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

Where the state court has passed on constitutional issues on a first appeal, remanded for further proceedings, and then refused to reconsider the previous decision on the second appeal, this Court may consider the issues on review of the second appeal. That is true even if the claim was not renewed. The fact that the first decision became law of the case in state court does not limit the ability to review now the substantial federal questions raised or passed on in earlier stages of the litigation. *Barclay v. Florida*, 463 U.S. 939, 946 (1983); *Hathorn v. Lovorn*, 457 U.S. 255, 261-262 (1982); *Reece v. Georgia*, 350 U.S. 85, 86-87 (1955). That is the precise situation at bar. J.S. 6a-7a, n. 2.

The procedural situation at bar is virtually identical to *Time, Inc. v. Firestone*, No. 74-944, discussed by Mr. Chief Justice Rehnquist, dissenting, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 501, 511-512 (1975). The Florida Supreme Court had rejected a first amendment defense to a libel action and remanded for further proceedings on state law issues. After the second state court appeal, this Court granted certiorari and decided the first amendment issue. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). See also, *Kirkpatrick v. Christian Homes of Abilene,*

Inc., 460 U.S. 1074 (1983) where further proceedings might moot the issue.

Appellant submits that jurisdiction lies to consider the equal protection issues on either appeal or writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of § 1 of the Fourteenth Amendment to the United States Constitution. J.S. 3. The proceedings in California applied California Civil Code sections 7004, subdivision (a), J.S. 70a; section 7006, subdivision (c), J.S. 71a; and section 7017, subdivision (d)(2), J.S. 70a, the primary statute involved, as construed to include section 4600, subdivision (c). J.S. 70a.

STATEMENT OF THE CASE[3]

The Statutory Scheme

Edward had no right to initiate a proceeding to establish his paternity and get custody or visitation. Only when the mother decided to relinquish Katie for adoption did any rights for him commence. J.S. 43a, 44a, 49a; § 197, SA 1b; § 7006, J.S. 71a.

[3] The facts essentially are undisputed. Summaries by the courts below are at: J.S. 2a-6a, 36a-37a, and 51a.

If identified to the satisfaction of the court, a father must be given notice and a hearing. J.A. 39a, 43a. Only then does he have the right to assert paternity and seek custody, assuming full parental responsibility.

To terminate his parental rights by permitting adoption without his consent, it must be shown by clear and convincing evidence that custody with a third party is required to serve the best interests of the child and that custody with the father will be detrimental to the child. J.S. 48a, 70a.

A mother's consent is always required. A presumed father's consent is always required, too. J.S. 72a; § 224, SA 2b; § 232, SA 3b. Edward could become a presumed father only if he got custody.

A father may become a presumed father only with the consent of the mother. It requires marriage, attempted marriage, or taking the child into his home and openly holding it out as his own, i.e., having custody which he can get only with the mother's consent. J.S. 70a-71a.

Without custody, Edward loses his parental rights. Mothers and presumed fathers may lose their parental rights only after proof by clear and convincing evidence, § 232, SA 9b, of some incapacity, neglect, or abandonment. § 224, SA 2b; § 232, SA 3b; Cal. Welf. & Inst. Code, §§ 300, SA 10b, 360, 366.26.

The Thwarted Relationship

Edward and Katie's mother dated for a few months in the Fall of 1980, ending the relationship in November.

J.S. 36a. Neither knew then of the pregnancy. The mother never told Edward she was pregnant. J.S. 36a.

Katie was born July 18, 1981. Edward was named as the father on the birth certificate. R.26793, C.T. 4. The mother talked to the County adoption worker on July 20th, R.26793, R.T. 8, and decided to relinquish Katie for adoption. She was placed in foster care July 21st, not yet with the prospective adoptive parents. On August 1st, the mother told Edward of the birth and asked that he relinquish his rights to permit adoption. She wanted the child adopted by someone neither of them knew. R.26793, R.T. 10.

Edward called the adoption worker on August 3rd, R.26793, R.T. 9, 30, and met with her August 5th. At first he did not want to take physical custody because he had actual custody, though not legal custody, of two young sons by his former marriage. R.26793, R.T. 27-28. Instead, he asked that his daughter be placed with his friends who did babysitting for his sons. He submitted a profile of them to be considered as adoptive parents. R.26793, R.T. 9-10.

He would not, however, relinquish Katie for adoption or waive any legal rights. R.26793, R.T. 31; C.T. 5. He was told to either relinquish his rights or wait for the County to bring legal action. R.26793, R.T. 31. He had no money to hire a lawyer to advise him. R.26793, R.T. 31.

The mother relinquished her daughter on August 5, 1981. R.26793, R.T. 10.

Edward met again with the adoption worker August 10th. He had learned that the mother had relinquished

Katie so he might never see her. He was seeking counsel from the adoption worker and various other people "to get my feelings together since I had only learned about the pregnancy so quickly." R.26793, R.T. 32. He also wanted to know his legal rights, including the right to counsel. R. 26793, R.T. 14.

On August 17th, Edward was allowed a supervised visit with his daughter for 30-45 minutes. He met again with the adoption worker and told her he definitely wanted custody. R.26793, R.T. 32. On August 24th, Katie was placed with prospective adoptive parents. R.26793, R.T. 22. No investigation was ever made of Edward's suitability as a custodial parent. R.26793, R.T. 16, 24. He saw Katie for the next and last time on November 3, 1981. R.26793, R.T. 15.

The First Trial

A petition to terminate Edward's parental rights was filed by the County August 10, 1981, alleging he was the father. J.A. 3. The court-ordered investigation, J.A. 4, established that he had been named on the birth certificate, R.26793, C.T. 4-5; he alleged his paternity in his answer, J.A. 5; and paternity was stipulated at trial. R.26793, R.T. 3. He proved his paternity. J.A. 7.

Edward's answer also sought legal and physical custody. He wanted his parental rights preserved. J.A. 5.[4]

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[4] No objection was ever made to the timeliness of the pleading nor to its adequacy to seek a determination of paternity or award of custody to Edward, with preservation of his parental rights. § 7006(c), J.S. 71a; § 7017(d)(2), J.S. 72a.

Edward continued to seek full custody and parental rights at the trial, when Katie was still only 5 months old. R.26793, R.T. 31-32, 35, 37, 42, 43. (His sons were returning to live with their mother that day. R.26793, R.T. 28.) He had received support from his pastor, relatives and friends. R.26793, R.T. 42-45.

Edward felt that a natural parent should care for his children, and did not want to be cut off forever. R.26793, R.T. 42. Edward had expressed that fear when telling the adoption worker on August 17th that he wanted custody. R.26793, R.T. 32. "I feel that it is very important for a natural father to have that input into a child's life." R.26793, R.T. 37.

The trial court found that Edward had shown himself to be "a good and loving parent (who) can provide a good, loving home for" Katie. R.26793, R.T. 65; J.A. 7, 11. Further, the homes presented, Edward's and the prospective adoptive parents' (who did not testify but were described by the adoption workers. R.26793, R.T. 12, 22), were "more or less equally balanced as far as their (sic) quality of life that they can afford this child." R.26793, R.T. 65.

But Edward had failed to carry his burden of proof of showing by a preponderance of the evidence that it would be in the best interests of the child for him to have custody. J.A. 7-8. The court found it would be best to leave Katie with her prospective adoptive parents. The adoption workers had testified it was best not to move her. R.26793, R.T. 12, 22. So Edward's parental rights were terminated: her adoption could proceed without his consent. J.A. 7, 10; J.S. 64a.

The First Appeal

On appeal, the California Supreme Court reversed. Section 7017(d)(2) was read to be a statute for determining custody rights. Edward had to win custody which would make him a presumed father, requiring his consent to adopt. Therefore, as in all California custody proceedings, the parental preference rule applied. § 4600(c), J.S. 70a, 39a-40a, 48a-49a.

Thus, to give custody to a nonparent, the court must find it is in the best interests of the child and that custody to a parent would be detrimental to the child.

The California Supreme Court went on to review the decisions of this Court concerning the rights of unwed fathers under the United States Constitution. J.S. 45a-48a. No due progress violation was found. J.S. 47a. As construed, to require a finding of detriment and best interest, the statute was found to meet all other constitutional requirements, this Court never having ruled on a similar factual situation nor on the best interests/detriment to the child test as sufficient without the need for a finding of parental unfitness. J.S. 47a.

The best interest/detriment standard was found adequate to protect the father's right to the opportunity to care for his child and to develop a relationship, which arises once he manifests a significant parental interest. J.S. 48a-49a.

The judgment was reversed, however, because there was not sufficient evidence to justify depriving Edward of custody, and hence his parental rights, as of the time of

trial. J.S. 49a. The case was remanded for further proceedings to take evidence on subsequent circumstances, particularly the relationship of the child to the prospective adoptive parents. J.S. 49a, n. 12.

The Second Trial

As of the further hearing in February of 1985, J.A. 12, Katie had been with the prospective adoptive parents continuously since placed there by the adoption workers August 24, 1981. R.D003076, R.T. 23. All of Edward's visitation requests and requests for pictures and information had been refused. R.D003076, R.T. 45, 46-48, 62, 165-167.

Because of the long time Katie had been in the pre-adoptive home, she had formed strong ties: bonded. The court found it would be detrimental to remove her and give custody to Edward. J.A. 23-24.

The court relied on the County's expert witness, giving his testimony more weight than Edward's experts'. J.A. 23. Nevertheless, the court encouraged the prospective adoptive parents to make Edward part of Katie's extended family which they said they would do. J.A. 24.[5]

The County's psychiatrist, a regular consultant for them, R.D003076, R.T. 71-72, opined that Katie would be seriously psychologically harmed if custody were given to Edward, immediately or after a slow transition period.

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[5] No visitation has been permitted since the second trial, despite requests and a motion for visitation pending appeal which was denied. San Diego Superior Court file no. A24905.

R.D003076, R.T. 104. His opinion was based largely on studies of 15-30-month-old children who had been removed from their parents, J.A. 14, although Katie was then 43 months old.

The County's expert felt that visitation by Edward would be beneficial to Katie, R.D003076, R.T. 97, 105-106, 108, but it should be, he felt, at the discretion of the adoptive parents. Court-ordered visitation might occasionally inconvenience the adoptive parents or Katie. The adoptive parents would not have complete control, if the court ordered visitation, and Katie might be planning to have friends sleep over. R.D003076, R.T. 107. Still, both prospective adoptive parents thought Katie would benefit from knowing her father. R.D003076, R.T. 47-48, 63-65. They said a visitation plan could be worked out. R.D003076, R.T. 97.

Edward's expert witnesses, a clinical psychologist, R.D003076, R.T. 113-114, and an experienced social worker, R.D003076, R.T. 154-156, believed any psychological effects on Katie would not be that serious. The effects could be ameliorated, especially by a transitional program, and Katie would do well with Edward. The fact that he was a good father would help a lot. R.D003076, R.T. 121-122, 123-126, 156-159. Nothing in the record showed Edward to be other than the same good, loving father he was at the first trial. J.S. 6a.

The trial court again found bonding and concluded there would be extreme psychological harm to Katie from any change of custody, with or without a gradual transition program. The prospective adoptive parents were

encouraged to include Edward in Katie's extended family. J.A. 24.

The Second Appeal

A divided Court of Appeal affirmed. Although Edward had "done everything he reasonably could have to establish a parent-child relationship with Katie," J.S. 12a, the court was bound by the law of the case. All constitutional issues were resolved against him by the California Supreme Court and the Court of Appeal could not reconsider them. J.S. 6a-7a, n. 2.

The court could consider only whether the record contained substantial evidence to support the finding of detriment to the child. J.S. 7a. The definition of detriment did not require a finding of "negative evidence regarding the father, evidence which is admittedly lacking in this case." J.S. 8a.

The dissent believed the constitutional issues forming the basis for the parental preference rule required reversal. J.S. 24a. Because Edward had done nothing adverse to his parental rights, the mother was given complete control to deny his rights. J.S. 25a-26a. Further, there was not substantial evidence to support a finding of detriment sufficient to terminate parental rights. J.S. 29a. A transitional change of custody would be appropriate and sufficient to protect Katie. J.S. 34a.

SUMMARY OF ARGUMENT

Edward McNamara wants his parental rights restored so he can be part of Katie's life and she can be part of his life. He probably would not get custody, at least for now, because Katie has been with her present custodians for 7 years. But he could still contact her and visit her, lending financial support and making a father's unique contribution of moral, emotional, and psychological support. All children can use all of the love they can get. Perhaps she would want to live with him in the future. In any event, they could develop a life-long father-daughter relationship.

Edward wants to be a fully responsible participant in Katie's life. He came forward promptly to assume full parental duties. He asked the County for custody. He responded to the proceeding to terminate his parental rights by claiming paternity (he was adjudicated the father, legitimizing her in the usual sense), and asking for custody. That made him fully liable for support if his rights were not terminated.

He definitely is not a disinterested or casual father simply trying to veto an adoption, which has failed before. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

Edward crossed the threshold to full fatherhood by accepting full parental responsibilities promptly. He did all he could, all the law and circumstances required and allowed. J.S. 12a. That gave him a constitutionally protected liberty interest in his parental rights and relationship with Katie and the opportunity to develop a personal relationship. *Lehr*, 463 U.S. at 261-262. Indeed,

the California statute gave him standing to seek parental rights – recognized him as a father – only if he accepted full responsibility, by admitting paternity and seeking custody, which he did eagerly.

The issues presented are equal protection claims because Edward got a hearing. He got an excess of process, 7 years in the courts, and eventually lost Katie only because of the mistakes and delays of the courts, J.S. 6a, 13a, 15a, n. 1, 49a-50a: a classic case of justice delayed is justice denied.

Once Edward got his hearing, the question became: what is the hearing about? What rights does he have? What standards, tests, or criteria are to be used to decide if his parental rights are to be terminated? Edward contends that the Equal Protection Clause of the Fourteenth Amendment entitles him, as a father who has achieved a protected interest and right to develop a personal relationship, to the same right to withhold his consent to adopt as the mother and presumed fathers, *Caban v. Mohammed*, 441 U.S. 380, 394 (1979), and to have his parental rights terminated only on the same grounds as the mother and presumed fathers. § 224, SA 2b; § 232, SA 3b. *Stanley v. Illinois*, 405 U.S. 645, 649, 658 (1972).

But California gave the mother complete control. She may always veto an adoption. § 7017, J.S. 72a. The unwed father may seek parental rights only if she relinquishes for adoption. J.S. 43a. She kept Edward from getting Katie after she released her for adoption, merely because she wanted the child to go to someone who knew neither her nor Edward. J.S. 36a.

Presumed fathers, who marry or try to marry the mother or are allowed to take the child into their home, § 7004, J.S. 70a, have the same rights as mothers. All must consent to adoption and may lose their parental rights only on proof of specific conduct affecting the child; some inability or unwillingness to parent usually described as parental unfitness, or abandonment.

But Edward lost all parental rights because it was, according to the trial judge, in the best interests of the child and custody at that time with Edward would be detrimental to her; the latter because she was emotionally attached to her custodians: bonded. That is California's best interests of the child test applied in custody proceedings. J.S. 39a, 48a. But there is no loss of parental rights in a custody proceeding. The rights are retained, custody may be modified on a change of circumstances, and visitation is permitted.

A permanent loss of rights should not be based on current, changeable circumstances; there is no justification for using the standard. Moreover, the standard is vague, ill-defined, disputed and subject to arbitrary application. The best interests test, even with a finding of detriment, gives significantly less protection to parents than the unfitness test described with particularity and applied to others.

The State's legitimate interests are served when the child is found a good, loving home, which Edward offered. There is no legitimate interest in terminating the rights of a capable father willing and able to make a full commitment to the responsibilities of fatherhood just to promote adoptions.

Edward is entitled to equal protection. He should be allowed to establish that precious, life-long father-daughter relationship.

ARGUMENT

I. EDWARD HAS A PROTECTED LIBERTY INTEREST IN RAISING KATIE.

The constitutional view of family relationships was reviewed in *Stanley v. Illinois*, 405 U.S. 645 (1972):

> "The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's own children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights.' *May v. Anderson*, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, 262 U.S. at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, 316 U.S. at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).
>
> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." *Id.*, at 651. See also, *Smith v. Organization of Foster Families*, 431 U.S. 816, 846-847 (1977).

Children have a fundamental interest in a relationship with their father, too. *Bowen v. Gilliard*, 107 S.Ct. 3008, 3021, 3024, 97 L.Ed.2d 485, 506, 509 (1987) (Brennan, J., dissenting). Termination of parental rights interferes with a "fundamental liberty interest." *Santosky v. Kramer*, 455 U.S. 745, 754, n. 7 (1982). "(T)he private interest affected is commanding . . . " *Id.*, at 758.

II. EDWARD CROSSED THE THRESHOLD TO FULL FATHERHOOD, ACHIEVING A PROTECTED LIBERTY INTEREST BY COMING FORWARD TO TAKE FULL PARENTAL RESPONSIBILITY

A. An unwed father gains a protected parental interest by demonstrating a full commitment to the responsibilities of parenthood

The Court has required a demonstration of commitment to fatherhood to gain a protected interest. Mr. Stanley was undisputedly the father, had lived with his children, and had supported them. *Stanley*, 405 U.S. at 650, n. 4.

Mr. Quilloin did not take advantage of his ability to legitimize his child for 11 years. He never had custody, did not seek custody,[6] and provided support irregularly. He never "shouldered any significant responsibility . . . ,"

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[6] *Custody.* Although Edward asked for custody, undue emphasis should not be placed on that as a necessary element of accepting parental responsibility. Millions of fathers play significant roles with visitation and build life-long relationships. The mother here, of course, did not want her child, so only a custody request was initially available to Edward, which he eagerly accepted.

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nor took advantage of legal remedies available to establish his paternity. *Quilloin v. Walcott*, 434 U.S. 246, 251, 256 (1978). Therefore, the courts could consider the "extent of [his] commitment to the welfare of the child." *Id.* at 256; see, *Caban v. Mohammed*, 441 U.S. 380, 389, n. 7 (1979). It was held permissible to grant a stepfather adoption, over his objections, on the grounds that it was in the best interests of the child. *Id.* at 255.

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In some situations, perhaps the one at bar, custody with someone else might be best, but parental rights and contact could still be preserved. Perhaps a mother would want to keep custody and the father would still want parental rights. (Edward's inability to establish parental rights under the California scheme until the mother relinquished for adoption raises interesting due process and equal protection issues not presented where there has been a hearing for the father.) If it is best for the child to be in someone else's custody, at least for the present, a father should not be faulted – not denied basic civil rights – if he does not demand immediate custody. And not if he fails to get immediate custody because of current circumstances, either.

So long as the unwed father takes full legal responsibility and assumes all other responsibilities available to him, he should have a protected parental interest and a right to further develop the relationship. Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 Ohio State L.J. 313, 351-352, nn. 294-300, 368, n. 416 (1984).

> "(T)he message is that if an unwed biological father is willing and able to perform those functions that society has always deemed critical for the protection and development of children, the Constitution requires the state to allow him to do so, initially and to continue doing so, in the absense of circumstances not of the state's own making." *Id.*, at 382, see, *Lehr*, 463 U.S. at 271, n. 3, 271-272 (White, J., dissenting).

Mr. Caban, however, was entitled to the same rights in an adoption proceeding as the unwed mother: a requirement that he consent to adoption unless he was found incompetent as a parent or abandoned his children. *Caban*, 441 U.S. at 385-386. To give him less protection was a denial of equal protection. *Id.*, at 382. "The effect***is to discriminate against unwed fathers even when their identity is known and they have manifested a significant parental interest in the child." *Id.*, at 394.

Mr. Caban had been named as father on the birth certificate, lived with the children, supported them, and petitioned to adopt. *Id.*, at 382-383. He had admitted paternity, established a substantial relationship, and participated in rearing his children. *Id.*, at 392-393.

Mr. Lehr, on the other hand, was not even entitled to a hearing because he had not availed himself of an available procedure to register as the father. *Lehr v. Robertson*, 463 U.S. 248 (1983). He was not named on the birth certificate, never supported the child, and rarely saw her. He never offered to marry the mother.[7] *Id.*, at 252.

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[7] *Marriage.* Attempts at marriage were not required of Messieurs Stanley and Caban. This mother eschewed marriage, J.S. 21a, and surrendered her child. A marriage proposed in these circumstances would have added nothing to Edward's demonstration of a full commitment.

Additionally, current societal mores do not require marriage. Many couples live together without marrying and many children born out of wedlock are reared successfully. Wheeler, *A Father's Right To Know His Child: Can It Be Denied Simply Because the Mother Married Another Man?*, 20 Loyola L. A. L. Rev. 705, 722 (April 1987). California recognizes these informal arrangements. *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal.Rptr.

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The threshold test for acquiring a protected liberty interest in parenthood was synthesized in *Lehr:*

> "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban,* 441 U.S., at 392. His interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he 'act[s] as a father toward his children.' *Id.*, at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. **** The significance of the biological link is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.*, 463 U.S. at 261-262.

Edward demonstrated a full commitment. He is entitled to the same protection as unwed mothers and other fathers under the Equal Protection Clause of the Fourteenth Amendment, just like Messieurs Stanley and Caban. He also was denied completely the opportunity to develop a relationship he valiantly is trying to grasp.

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815, 557 P.2d 106 (1976). California found no basis for distinguishing because of no marriage or attempt by Edward. J.A. 48a-49a.

B. Edward did all he could to establish a full legal and personal relationship with Katie

Seventeen days after learning of Katie's birth, Edward asked for full custody so he could raise her. That was 12 days after first talking to the adoption worker. In the meantime, he had sought counsel, personal and legal, from the adoption worker and others. He accepted his responsibilities although the mother and the County were urging him to shirk his duties.

He responded to the petition to terminate his parental rights by asserting his paternity, admitting the truth of the birth certificate, and asking for full custody. J.A. 5. Getting custody would have made him a presumed father, § 7004(a)(4), J.S. 71a, able to stop the adoption. It also, of course, would have made him fully liable to support Katie. § 196, SA 1b.

Unlike Messieurs Lehr and Quilloin, he assumed full responsibility and pursued all available legal remedies to establish his paternity. He is trying hard to be like Messieurs Stanley and Caban. He failed so far only because the statute allowed the mother full control and the County interfered.[8] He most certainly is not a disinterested father looking just for the right to veto an adoption.

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[8] *Newborns.* The fact that Katie was recently born means that Edward promptly did all that the law and the circumstances allowed and all that time allowed him to do to establish personal contact. Only the mother and the adoption agency, acting under the statutory scheme, prevented him.

Therefore, the issues of identifying fathers promptly or using more stringent tests to measure abandonment, *Caban,* 441 U.S. at 392, n. 11, do not arise on the record, or the statute,

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The courts below recognized that Edward had done everything he reasonably could to establish a parent-child relationship. J.S. 12a. He did everything required by the criteria of this Court. He is entitled to legal status and to develop personal contact. *Lehr*, 463 U.S. at 261; Wheeler, *op. cit.*, 20 Loyola L. A. L. Rev. at 718. Indeed, the California statute requires a full commitment, as described by the Court, even to get a hearing. § 7017(d)(2), J.S. 72a. The statute ought to confer parental rights and provide an opportunity for a personal relationship by its terms.

C. Acceptance of full parental duties carries reciprocal parental rights

Parental rights are linked to acceptance of parental responsibilities. *Lehr*, 463 U.S. at 257-258. When the father makes the commitment, the child has a right to rely on his unique contributions. *Bowen v. Gilliard*, 107 S.Ct. at 3023, 97 L.Ed.2d at 508 (Brennan J., dissenting). By accepting all parental duties, Edward undertook significant financial burdens, *Clark v. Jeter*, No. 87-5565 (1988), 56 U.S.L.W. 4527, 4528-4529 (June 7, 1988), unlike the typical father in a paternity proceeding who disavows any interest in providing financial, physical, and moral

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despite the California Supreme Court's attempt to distinguish on that basis. J.S. 45a, n. 8. There is no reason – no way on these facts – to require more or sooner than Edward did. (California makes no such more stringent requirements for newborns in other termination proceedings. § 224, SA 2b; § 232, SA 3b.)

support for the child. *Rivera v. Minnich*, 107 S.Ct. 3001, 3004-3005, 97 L.Ed.2d 473, 480 (1987).

Edward volunteered to undertake "a life-long relationship with significant financial, legal, and moral dimensions." *Id.*, at 107 S.Ct. at 3006, 97 L.Ed.2d at 482 (Brennan, J., dissenting). He assumed a "cultural role with distinct moral expectations. Most of us see parenthood as a lifelong status whose responsibilities flow from a wellspring far more profound than a legal decree.*** It has***the potential to set in motion a process of engagement that is powerful and cumulative and whose duration spans a lifetime." *Id.*, 107 S.Ct. at 3007, 97 L.Ed.2d at 483 (Brennan, J., dissenting).

Despite the denial of Edward's rights and opportunities, he still has a protected interest and should be allowed as much opportunity as is still available to him.

III. THE DISTINCTIONS MADE BETWEEN UNWED FATHERS AND BOTH UNWED MOTHERS AND PRESUMED FATHERS SHOULD RECEIVE HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

A. Gender-based distinctions are examined with heightened scrutiny

To permit discrimination between unwed mothers and unwed fathers, the distinction must bear a substantial relationship to achieving important governmental objectives. *Caban*, 441 U.S. at 382, 388, 391. That is the test given to all gender-based distinctions. *Clark v. Jeter*, No. 87-5565 (1988), 56 U.S.L.W. 4527, 4528 (June 7, 1988). There must be exceedingly persuasive justification for the

classification. *Mississippi Universtiy for Women v. Hogan*, 458 U.S. 718, 724 (1982).

> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id.*, at 724-725.

The distinctions may not be based solely on differences that are irrelevant to the legitimate governmental objective. *Lehr*, 463 U.S. at 265.

B. The distinctions between fathers should be tested with heightened scrutiny

The Court has yet to examine the distinctions between unwed fathers with protected interests and other fathers as to withholding consent to adopt. *Caban*, 441 U.S. at 394, n. 16 (gender-based rejected); *Quilloin*, 434 U.S. at 255-256 (no manifestation of significant parental interest); but cf., *Stanley*, 405 U.S. at 658.

Appellant submits that the distinctions at bar should be reviewed with heightened scrutiny because of the basic civil rights at stake, *Stanley*, 405 U.S. at 651; rights "particularly important" and "more substantial than mere loss of money"; a "significant deprivation of liberty." *Santosky v. Kramer*, 455 U.S. at 756. Heightened scrutiny is generally applied to classifications based on illegitimacy. *Clark v. Jeter, supra*, 56 U.S.L.W. at 4528.

If a less stringent test is applied, the disparate treatment still must be rationally related to a legitimate governmental purpose. *Id.*, 56 U.S.L.W. at 4528. The distinctions then must rest on a fair and substantial relationship to the objective of the legislation so all persons similarly situated are treated alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451, 452-453 (1985); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

The California statute does not pass either test.

IV. THE STATE'S INTEREST IS SERVED BY FINDING PERMANENT, LOVING HOMES FOR CHILDREN, WHICH EDWARD OFFERED

The legitimate state interests are served when a good, permanent home is provided for Katie. § 232.6, SA 10b; J.S. 20a; *Santosky v. Kramer*, 455 U.S. at 766; *Stanley*, 405 U.S. at 652, 657. Nothing is to be gained by completely separating Edward from Katie if he can provide good parenting, guidance, and emotional and moral support.

Adoption is merely a substitute when the biological family cannot be maintained. J.S. 20a-21a. Indeed, terminating parental rights to free for adoption does not even guarantee any particular, or any, home for the child. *Santosky*, 455 U.S. at 765, n. 15. The County argued at the first trial that the court did not have the power to decide custody in the proceeding. Even a denial of the petition to terminate parental rights did not give Edward custody, just the right to apply for custody later. R.26793, C.T. 35. The California Supreme Court agreed, J.S. 50a, despite the fact that Edward had to be entitled to custody against the world to keep his parental rights.

By stepping forward to take full responsibility, Edward met the test of *Lehr* and fulfilled the State's legitimate interest in caring for Katie. Buchanan, *op. cit.*, 45 Ohio State L. J., 363, n. 387, 367, nn. 402-404. The State defeats its own interest if it terminates parental rights when the parent is able to care for his child. *Stanley*, 405 U.S. at 652-653.

California admittedly had no legally cognizable interest in terminating Edward's parental rights in 1981. J.S. 20a, 48a-49a. There were no policy reasons to give the mother a veto of his desire to have Katie. J.S. 48a-49a. The judgment was reversed for lack of evidence.

The issue in the second trial was whether Edward should have custody, as of that time; not whether Edward had forfeited his rights, or was unable to care for Katie then or in the future. Current custody is not a State interest which justifies terminating all rights; it is a separate issue.

In this setting, the distinctions between unwed mothers (already rejected by the California Supreme Court, J.S. 48a-49a) and presumed fathers, and Edward and those like him (all who come forward under section 7017) serve no legitimate state objective requiring terminating parental rights.

V. THE DISCRIMINATION AGAINST NATURAL FATHERS IS IRRATIONAL AND SERVES NO STATE INTEREST

A. Giving complete control of the child to the mother serves no State interest

California gives complete control to the mother: title to child. He could not start a paternity proceeding. J.S.

43a-44a. She must consent if he is to become a presumed father: There must be a marriage or an attempt to marry, or she must allow him to take the child into his home so he may openly hold it out as his own. § 7004(a), J.S. 70a. Her consent is always needed to adopt. § 7017(d)(2), J.S. 72a. Edward could not get Katie from the County because the mother wanted the child to go to someone neither the mother or father knew, even after she relinquished the child. Only that gave Edward some legal rights, if he were willing to be a complete parent: absolute control even though the mother wanted nothing more to do with the child.

The treatment is as disparate and complete as the differing presumptions of fitness (and of the same kind where different standards are used) found a denial of equal protection in *Stanley*, 405 U.S. at 649, 658, and exactly the same kind of veto power to a mother without like power to an unwed father with protected interests invalidated in *Caban*, 441 U.S. at 394.

The California scheme allows a father's rights to be cut off by arbitrary action of the mother; it is an undifferentiated distinction applicable to all circumstances. *Ibid.* The distinctions are irrelevant to legitimate objectives and are distinctions with an important difference. See, *Lehr*, 463 U.S. at 265-266. It is an example of over-broad, gender-based generalization, *Caban*, 441 U.S. at 394, impermissibly carrying the "baggage of sexual stereotypes." *Orr v. Orr*, 440 U.S. 268, 283 (1979).

This complete control is not based on any universal difference between maternal and paternal relations. A father may be a good parent, *Caban*, 441 U.S. at 389;

Stanley, 405 U.S. at 654-657; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975), even an unwed one. Herzog, *Some Notes About Unmarried Fathers*, 25 Child Welfare 194 (April 1966). "The actions of *both* parents after the birth of their child determine their ability to accept parental responsibility.***Her decision to release the child for adoption should not deprive the father of a meaningful opportunity to retain and develop his relationship." J.S. 48a-49a, emphasis original. Yet she has absolute title and he is subjected to a different and vague test for terminating parental rights. It makes no sense to presume that all natural fathers who are not presumed fathers are disinterested, J.S. 18a-19a; especially when he must manifest complete interest to get a hearing.

This mother opted out of parenthood at birth. Her status as a mother, and hence any differences she may have as a mother, should cease once she relinquishes. She should not be allowed unilaterally to interfere with the father's parent-child relationship. *Lehr*, 463 U.S. at 271, n. 3 (White, J., dissenting); Buchanan, *op. cit.*, 45 Ohio State L.J. at 361-362 ("(H)er interest should be considered no further in the adoption process"), *Id.*, at 366, n. 401. (In other parental rights terminations, state interference would prevent the finding of intent to abandon necessary to terminate. *In re George G.*, 68 Cal.App.3d 146, 160, 162, 164, 137 Cal.Rptr. 201 (1977); Buchanan, *op. cit.*, 45 Ohio State L.J. at 374, n. 468.)

The final balancing at bar is the wishes of a mother who has rejected further parenthood *versus* an able and loving father who promptly, on learning of the birth, eagerly sought all parental responsibility. She won because she wanted the child placed with someone else,

although he would serve well the child's interests and the State's. His interests in parenthood and a personal relationship, commanding interests, far outweigh hers. She serves only her own private concerns.

Yet, she wins because of her sex and the child's status; flimsy excuses for cutting off basic civil rights. That, appellant submits, is what equal protection is about: Edward was denied.

B. There is no rational basis for discriminating between defined presumed fathers and other unwed fathers who come forward to assume parental duties

All presumed fathers are given the same custody rights, § 197, SA 1b, and rights to withhold adoption consent as unwed mothers. § 7017(d)(2), J.S. 72a. Their parental rights may be terminated only for incapacity to parent, neglect, or abandonment on specified grounds with particular proof. § 224, SA 2b; § 232, SA 3b; Cal. Welf. & Inst. Code § 300, SA 10b.

The legislative presumption, upheld by California courts, is that many of the nonpresumed fathers, natural fathers, do not care about their children. The "class will contain a substantial portion of fathers who are strangers to the child and whose objections to adoption will be based on something other than a mature consideration of the child's best interest." *W.E.J. v. Superior Court*, 100 Cal.App.3d 303, 314, 160 Cal.Rptr. 862 (1979). But this assumption is not rational: "It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment

to adoption usually is the result of a natural parental interest***" *Caban*, 441 U.S. at 391-392. The statute requires that they be interested and caring. That is also required to get a constitutionally protected interest under the Court's cases. Edward disproved the presumption, too, by his conduct.

Further, his conduct, and the conduct required to get into court, show a greater commitment to the child than necessary to become a presumed father. If married, the marriage may have been terminated 300 days before birth. If not married, but the father has attempted marriage, the same applies. Not all will know of the birth. Where marriage is attempted after birth, the father must consent to having his name on the birth certificate or have a written, voluntary agreement to support the child. Or he may take the child into his home and openly hold her out as his. J.S. 70a-71a.

Edward did not offer to marry, but his law suit to establish paternity must be the equivalent promise. Marriage was not an option for him: Katie had been surrendered. He certainly ratified his name on Katie's birth certificate. And he openly held her out as his child and tried all he could to get her into his home. That serves the State's interest and makes him more committed than many presumed fathers.

It makes no sense to work the presumption against him, denying him individualized proof. *Stanley*, 405 U.S. at 647. The California statute casts too wide a net. The very definition of men whose rights are to be considered takes them out of the presumption, but it is applied anyway.

Further, there is no reason to believe that a child raised by her natural father who was never married to or lived with the mother will thrive any less than one raised by a father who was once married to the mother. *Stanley*, 405 U.S. at 654, n. 7.

The classification is overbroad and misapplied. It does not relate to the stated objective: no vetoes if not interested in the child, *W.E.J. v. Superior Court, supra*, 100 Cal.App. 3d at 314; *Caban*, 441 U.S. at 394; *Stanley*, 405 U.S. at 654. All distinctions between presumed fathers and those who achieve a protected paternal interest by manifesting significant parental interest should be stricken. Particularly, all should lose their parental rights only on the same evidence.

C. Terminating Parental Rights Because Of Current Circumstances Regarding Custody Is Irrational

There simply is no rational basis for terminating parental rights based on a custody standard, as done here. J.A. 10. That is what the best interest standard is, even with the requirement of a finding of detriment. J.S. 48a; *In re B. G.*, 11 Cal. 3d 679, 695, 114 Cal.Rptr. 444, 523 P.2d 244 (1974).

In other termination proceedings specific proof is required of the elements justifying termination. *In re Carmaleta B.*, 21 Cal.3d 482, 492-493, 496, 146 Cal.Rptr. 623, 579 P.2d 514 (1978); *In re David C.*, 152 Cal.App.3d 1189, 1210-1211, 200 Cal.Rptr. 115 (1984). But custody awards are discretionary. 6 Witkin, *Sum. Cal. Law*, Parent and Child, § 72 (8th ed. 1974). That means an order not

beyond the "bounds of reason," *In re Marriage of Connolly*, 23 Cal.3d 590, 597-598, 153 Cal.Rptr. 423, 591 P.2d 91 (1979); rarely reversible. 9 Witkin, *Cal. Procedure*, Appeal, § 275 (3d ed. 1985).

Further, custody is always modifiable, § 4600, and visitation is permitted. § 4601. Adoption is final; all rights end. § 229. The action is severe and irreversible, no matter what the father's circumstances, or the child's, might be later. J.S. 48a; *Stanley*, 405 U.S. at 648-649; *Lehr*, 463 U.S. at 270 (White, J., dissenting).

Any father who is not interested or cannot provide paternal care will walk away and not contest termination. Those who do are more interested and likely more capable than those whose rights might be terminated in other proceedings. The State purpose is the same, though. There is no reason to treat them, mothers and presumed fathers, differently.

The stakes – the rights – at issue in termination proceedings are dramatically different from custody matters. An unwed father may lose all rights because of present, changeable circumstances. Even visitation is denied. All because he is a man and unwed: carry-over stereotypes. A loving, committed father is entitled to more.[9]

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[9] *Amended statute.* The statute has been amended to give him less. J.S. 13a-14a. Natural fathers no longer get the parental preference, and custody qualifications are not an issue. Only the best interests test, without a need for a finding of detriment, is considered in terminating his parental rights. The former statute was applied to Edward, J.S. 7a, but the new statute raises even more serious constitutional questions.

VI. HAVING CROSSED THE THRESHOLD TO FATHERHOOD, EDWARD IS ENTITLED TO THE SAME GROUNDS FOR TERMINATING HIS RIGHTS

A. A like finding of unfitness should be required to terminate the rights of a protected paternal interest

The Court has reserved ruling on the requirement of a finding of parental "unfitness" to terminate parental rights. *Caban*, 441 U.S. at 394, n. 16 (statute invalid on equal protection grounds); *Santosky v. Kramer*, 455 U.S. at 760, n. 10 (judgment not rendered on "best interest" grounds); *Quilloin*, 434 U.S. at 255 (father had not achieved a protected interest, so adoption in the "best interests" of the child permissible.) The cases, however, express doubt about the validity of such a standard for fathers who have protected interests.

Fathers with protected interests, however, are entitled to the same grounds or rights to object as other parents, and the "best interests" test is not sufficient protection. *Caban*, 441 U.S. at 394; *Stanley*, 405 U.S. at 658.

Although California does not use the term "unfitness" in most of its statutes, the conduct required to terminate is well within the traditional use of that term. Specific conduct is described, § 224, SA 2b; § 232, SA 3b; Cal. Welf. Inst. Code § 300, SA 10b, and specific, clear and convincing proof is required. *In re Carmaleta B., supra*, 21 Cal. 3d at 492-493.

Generally, these conditions may be described as some parental incapacity, neglect, or abandonment. Edward

argued that some negative evidence regarding him was required. J.S. 8a. The dissent below argued that there must be something wrong with the natural parent personally or with his or her circumstances that would detrimentally impact the child. J.S. 24a, 29a.

In *Caban* the New York test was parental incompetence or abandonment. 441 U.S. at 385-386. In Illinois, the test of unfitness was neglect. *Stanley*, 405 U.S. at 650. Unfitness might also be described as unwillingness or inability to care for the child. Buchanan, *op. cit.*, 45 Ohio State L. J. at 316, n. 14. Some such finding is the usual basis for terminating parental rights. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 Fam. L. Q. 245, 284-285 (Fall 1985).

There was no such evidence against Edward; just the opposite. J.S. 8a, 49a. Yet he was deprived of all possibility of contact with Katie, after crossing the threshold to fatherhood drawn by the Court. That is contrary to *Stanley* and *Caban*.

B. The best interests test is different, irrational for these proceedings, and promotes no State interest

The best interest test is a custody standard. Mistakes may be corrected and visitation granted; all involved parents remain in the child's life. The term is noble and high-minded – we all want the best for children – but the application is confusing, uncertain, and subject to arbitrary definition from case to case.

There is continuing debate among psychologists as to what is in the best interests of children. *Lehr*, 463 U.S. at 262, n. 18. Opinions change regularly. The experts at trial

disagreed as to Katie's interests and whether the effect of a change of custody with a transitional period would be so adverse as to preclude the possibility forever. Other experts disagree, too, as the process goes through study and application: the normal thesis, antithesis, synthesis process of social (and legal) development. Garrison, *Why Terminate Parental Rights?*, 35 Stanford L. Rev. 423, 459, nn. 164-165 (Feb. 1983). The term is vague and arbitrary and should be rejected.

> "In the absence of legislative definition, decisions merely reflect each judge's own 'folk psychology.' As a result this standard promotes excessive, and often discriminatory, removal. It also permits judicial decisions to be based on value judgments not commonly held by society or approved by the legislature." Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stanford L. Rev. 623, 650, n. 124 (April 1976).

We are unable to predict accurately human behavior and lack a social consensus about the values that should shape our decisions. "(T)he very lack of consensus about values that makes the best-interests standard indeterminate may also make the formulation of rules inappropriate: a legal rule must, after all, reflect some social value or values." Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law and Contemporary Problems 226, 264 (Summer 1975).

> "Unlike the standard of 'parental fitness' which imposes a high burden on the state in an adversary proceeding, the standard of 'best interest' of the child provides an open invitation to trample on individual rights through trendy redefinitions and administrative or judicial abuse." *In re J.P.*, 648 P.2d 1364, 1376

(Utah 1982); see also, *In re Jones*, 34 Ill.App.3d 603, 340 N.E.2d 269, 273 (1975); *In re Adoption of Baby Boy C.*, 31 Wn.App. 639, 644 P.2d 150 (1982).

California courts have changed their views on how custody should be decided, too. *In re B. G., supra*, 11 Cal.3d at 693-699.

Whatever the utility of the best interests standard for modifiable custody orders, usually in divorce, it is not appropriate here; it is too subject to abuse. Buchanan, *op. cit.*, 45 Ohio State L. J. at 346-347. Because there supposedly is to be no one to compare the unwed father to, J.S. 50a, he ends up having to prove he is the most suitable parent available, as a practical matter. *Stanley*, 405 U.S. at 648. His rights are at the unfettered discretion of the trial judge subject to review only under the substantial evidence test, difficult to reverse for different results on nearly identical facts. *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, 429, 45 P.2d 183 (1935).

It is incumbent on the State to specity what parental conduct justifies termination of parental rights, to satisfy due process requirements. *Roe v. Conn*, 417 F.Supp. 769, 780 (M.D. Ala. 1976) (three-judge court).

> "When is a home an 'unfit' or 'improper' place for a child? Obviously, this is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views." *Ibid.*

If ordinary people may differ over unfitness, their diverse views on the best interests of children are likely

to be chaotic. The California legislature has defined unfitness through its statutes. Unwed fathers with protected liberty interests are entitled to no less.

Because the right to fair and equal grounds for rights termination is a substantive one, it is entitled to equal protection, too. *Stanley*, 405 U.S. at 658. That seems plain when the State has meticulously articulated the grounds for dispensing with the need for other parents to consent to adoption.

C. Adding a detriment finding does not make the best interests test any clearer or make it the same as a finding of unfitness

The requirement of a finding of detriment does not make the best interest test the equivalent of unfitness. It still is not like those statutes at all.

The requirement of a detriment finding was incorporated into the best interest test. It is not an independent standard. The purpose was to avoid comparisons of parents to others who might seek custody. The requirement of a finding of unfitness was dropped. *In re B. G., supra*, 11 Cal.3d at 693-699. There is much disagreement over its application, particularly to termination of parental rights.

Much of the controversy has been about bonding, the disputed fact issue below. The judges of the Court of Appeal disagreed on the definition of detriment to be applied and what definition was required to meet federal constitional requirements. J.S. 7a-14a, 24a-33a: the straight custody definitions, or adding some act or omission of the father, negative evidence. They also disagreed on whether Katie could make a successful transition to

Edward's custody after bonding, getting emotionally attached to someone else.

The Court of Appeal judges also disagreed on the application of a California Supreme Court case applying the detriment standard. *Michael U. v. Jamie B.*, 39 Cal.3d 787, 218 Cal.Rptr. 39, 705 P.2d 362 (1985). That application of the detriment standard resulted in three opinions for the five concurring justices plus a dissent for the other two. The courts disagree sharply on whether bonding should be a basis for terminating rights. See, *Id.*, at 801 (Reynoso, J., dissenting).

Removal of Katie from the pre-adoptive home would not have been sufficient detriment at 5 months, as a matter of law, J.S. 49a, or apparently at 2½ years. J.S. 15a, n. 1. Other cases have held there would not be sufficient detriment, or no detriment at all, from terminating the relationship with the primary caretaker at 1½ years (to trial), *In re Marriage of Halpern*, 133 Cal.App.3d 297, 302-303, 311, 184 Cal.Rptr. 740 (1982), or at 3½ years (to time of appeal), *In re Cheryl E.*, 161 Cal.App.3d 587, 594, 607, 207 Cal.Rptr. 728 (1984) (despite social workers' opinions to the contrary, where the parent was loving and capable). "If a child's immediate bonding or attachment to foster parents could outweigh all other considerations***(a)t best the court would merely pay lip service to the concept of parenting as a fundamental constitutional right. A dependent child's psychological bond with a foster parent may not be so easily used to satisfy the requirement" of detriment to terminate parental rights. *In re Venita L.*, 191 Cal.App.3d 1229, 1240, 236 Cal.Rptr. 859 (1987) (child 2½ at trial, nearly 4 when appeal decided).

> "I reject the idea that the ordinary consequences of removing a child from a settled home can constitute, *by themselves*, the kind of 'detriment' which justifies the forced termination of parental rights. The majority's analysis of this issue furnishes a rationale for unwarranted intrusion in all kinds of custody cases into the 'private realm of family life which the state cannot enter.' * * * * Situational emotional disturbance is likely to occur whenever a child undergoes a change of environment. If this were sufficient for termination of parental rights, the state could convert any temporary loss of custody into a permanent and irrevocable one." *In re B. J. B.*, 185 Cal.App.3d 1201, 1213, 1217, 230 Cal.Rptr. 332 (1986) emphasis original (Poché, J., concurring and dissenting) – that, of course, precisely describes Edward's situation.

Allowing termination of parental rights on such an ephemeral, dramatically different standard is patently inappropriate: a denial of substantive rights and equal protection.

VII. DECLARING THE USE OF THE BEST INTEREST/DETRIMENT TEST A DENIAL OF EQUAL PROTECTION WOULD LEAVE THE COURTS FREE TO DECIDE APPROPRIATE CUSTODY AND VISITATION ARRANGEMENTS

A. Parental rights should be decided on the threshold conduct of full parental commitment with custody decided on present circumstances

The history and treatment of a case previously before the Court on similar issues may provide some useful analytical framework. *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051 (1972). The Wisconsin Supreme Court had permitted termination of an unwed father's parental rights without notice, and the mother was given a veto. *State ex rel. Lewis v. Lutheran*

Social Services, 47 Wis.2d 420, 178 N.W.2d 56 (1970). The appeal was vacated and the case remanded for reconsideration in light of *Stanley* with "due consideration for the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time." 405 U.S. 1051.

The Wisconsin court refused to decide the termination issue on the current circumstances. If custody were left with the adoptive parents, it had to be done on a basis other than the adoption decree. Termination of parental rights and custody are different issues. The adoption could be vacated and custody still left with the adoptive parents or given to the father. *State ex rel. Lewis v. Lutheran Social Services*, 59 Wis.2d 1, 207 N.W.2d 826, 829 (1973).

Termination of parental rights was to be based on the initial conduct towards the child, 207 N.W.2d at 831, not on the best interest test.

> "The phrase 'best interests of the child' means all things to all people * * * but the tendency in man is to apply intuition in deciding that a child would be 'better' with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being 'in the best interests of the child.' Courts have not laid down any definite guidelines which can be followed to insure protection of what the average person means by 'best interests of the child.' The 'best interests of the child' test does not speak in terms of the present, the immediate future, or even the ultimate future of the child." *Ibid.*

After further hearings, it was held that the father had abandoned the child by denying paternity and refusing to assist or marry the mother before the child was born.

State ex rel. Lewis v. Lutheran Social Services, 68 Wis.2d 36, 227 N.W.2d 643 (1975).

Edward's conduct should entitle him to retain his parental rights, as a matter of law, for having manifested full parental interest. Custody should then be decided separately.

B. Continuing contact with Katie will benefit her and allow Edward to develop a relationship

Because the California courts erroneously held that the statute was constitutionally valid under the Equal Protection Clause and that Edward had not been denied any constitutional rights, his parental rights should be restored. That leaves the question of custody.

It is doubtful that Edward would get custody at this time. The case has already been tried on custody standards and Edward lost. Katie has been with the prospective adoptive parents since August of 1981. But Edward can still develop a relationship through visitation. Not all he wanted, nor all he should have received in 1981, but still something significant.

He would be eligible to seek custody in the future if circumstances change. Perhaps Katie would want to live with him. Perhaps the custodians would become incapacitated, or possibly die, leaving Edward the natural successor. Perhaps a lot of factors could change: custody is changed often. Older children become more interested in their fathers. *Michael U. v. Jamie B., supra*, 39 Cal.3d at 801 (Reynoso, J., dissenting).

Most importantly now: he could visit. The experts and the custodians agreed that contact would be good

and important for Katie. The voiced reservations about court-ordered visitation, p. 15, *supra*, were innocuous; the kind millions adjust to daily. The trial court recommended it. Visitation would allow a parent-child relationship with a loving father.

Visitation is part of the custody powers, part of the parent-child relationship that goes with parental rights. *Caban*, 441 U.S. at 406, n. 13 (Stevens, J., dissenting); it may be all that ever will be available. *Cf., Michael H. v. Gerald D.*, No. 87-746, *appeal pending*, 191 Cal.App.3d 995, 1001, 236 Cal.Rptr. 810 (1987); see footnote 6, p.21, *supra*.

Visitation would permit Edward to make a valuable contribution to Katie's emotional, social, and moral development. The continuing contact is important. *Bowen v. Gilliard, supra*, 107 S.Ct. at 3024, nn. 9-10, 97 L.Ed.2d at 509-510, nn. 9-10 (Brennan, J., dissenting); Garrison, *op. cit.*, 35 Stanford L. Rev. at 425.

Neither custody or visitation is in issue here. But Edward still has protected parental rights which may be exercised with benefit to Katie.

CONCLUSION

The California statute, as written and as construed, denied appellant equal protection of the laws, on its face and as applied. The judgment should be reversed with directions to deny the petition to terminate parental rights, which will result in further proceedings to determine custody and visitation.

Respectfully submitted,

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STATUTORY APPENDIX

California Civil Code section 196.

Support and education of children; equal responsibility

The father and mother of a child have an equal responsibility to support and educate their child in the manner suitable to the child's circumstances, taking into consideration the respective earnings or earning capacities of the parents.

California Civil Code section 196a.

Father's obligation to support and educate; civil action to enforce

The father as well as the mother of a child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor child, and in such action the court shall have power to order and enforce performance thereof, the same as in a suit for dissolution of marriage.

California Civil Code section 197.

Custody, services, and earnings of child

The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (a) of Section 7004, is equally entitled to the custody, services and earnings of the unmarried minor. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings.

California Civil Code section 224.

Consent of parents; when consent not necessary

A child having a presumed father under subdivision (a) of Section 7004 cannot be adopted without the consent of its parents if living; however, if one parent has been awarded custody by judicial decree, or has custody by agreement of the parents, and the other parent for a period of one year willfully fails to communicate with and to pay for the care, support, and education of the child when able to do so, then the parent having custody alone may consent to the adoption, but only after the parent not having custody has been served with a copy of a citation in the manner provided by law for the service of a summons in a civil action that requires him or her to appear at the time and place set for the appearance in court under Section 227; failure of a parent to pay for the care, support and education of the child for the period of one year or failure of a parent to communicate with the child for the period of one year is prima facie evidence that the failure was willful and without lawful excuse; nor a child with no presumed father under subdivision (a) of Section 7004 without the consent of its mother if living; except that the consent of a father or mother is not necessary in the following cases:

1. When the father or mother has been judicially deprived of the custody and control of the child (a) by order of the court declaring the child to be free from the custody and control of either or both of his parents pursuant to Chapter 4 (commencing with Section 232) of Title 2 of Part 3 of Division 1, or (b) by similar order of

the court of another jurisdiction, pursuant to any law of that jurisdiciton authorizing the order; or when the father or mother has, in a judicial proceeding in another jurisdiction, voluntarily surrendered his right to the custody and control of the child pursuant to any law of that jurisdiction provided for the surrender.

2. Where the father or mother of any child has deserted the child without provision for its identification.

3. Where the father or mother of any child has relinquished the child for adoption as provided in Section 224m; or where the father or mother has relinquished the child for adoption to a licensed or authorized child-placing agency in another jurisdiction pursuant to the law of that jurisdiction.

California Civil Code section 232.

Persons entitled to be declared free from parental custody and control

(a) *Description of persons.* An action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions:

(1) *Person abandoned by parents to care and custody of another; intent; support or communication with child.* The child has been left without provision for the child's identification by his or her parent or parents or by others or has been left by both of his or her parents or his or her sole parent in the care and custody of another for a period of six months or by one parent in the care and

custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child. The failure to provide identification, failure to provide support, or failure to communicate shall be presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents. In those cases in which the child has been left without provision for the child's identification and the whereabouts of the parents are unknown, a petition may be filed after the 120th day following the discovery of the child and citation by publication may be commenced. The petition may not be heard until after the 180th day following the discovery of the child.

(2) *Person neglected or cruelly treated by parents.* Who has been neglected or cruelly treated by either or both parents, if the child has been a dependent child of the juvenile court under any subdivision of Section 300 of the Welfare and Institutions Code and the parent or parents have been deprived of the child's custody for one year prior to the filing of a petition pursuant to this section. Physical custody by the parent or parents for insubstantial periods of time shall not serve to interrupt the running of the one-year period.

(3) *Person whose parents under disability due to use of alcohol or controlled substances or morally depraved.* Whose parent or parents suffer a disability because of the habitual use of alcohol, or any of the controlled substances specified in Schedules I to V, inclusive, of Division 10

(commencing with Section 11000) of the Health and Safety Code, except when these controlled substances are used as part of a medically prescribed plan, or are morally depraved, if the child has been a dependent child of the juvenile court, and the parent or parents have been deprived of the child's custody continuously for one year immediately prior to the filing of a petition pursuant to this section. As used in this subdivision, "disability" means any physical or mental incapacity which renders the parent or parents unable to adequately care for and control the child. Physical custody by the parent or parents for insubstantial periods of time shall not interrupt the running of the one-year period.

(4) *Person whose parents convicted of felony.* Whose parent or parents are convicted of a felony, if the facts of the crime of which the parent or parents were convicted are of a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child.

(5) *Person whose parents are declared to be developmentally disabled or mentally ill.* Whose parent or parents have been declared by a court of competent jurisdiction, wherever situated, to be developmentally disabled or mentally ill, if, in the state or country in which the parent or parents reside or are hospitalized, the Director of Mental Health or the Director of Developmental Services, or their equivalent, if any, and the superintendent of the hospital of which, if any, the parent or parents are inmates or patients, certify that the parent or parents so declared to be developmentally disabled or mentally ill will not be capable of supporting or controlling the child in a proper manner.

(6) *Person whose parent or parents are mentally disabled.* Whose parent or parents are mentally disabled and are likely to remain so in the forseeable future. As used in this subdivision, "mentally disabled" means that a parent or parents suffer any mental incapacity or disorder which renders the parent or parents unable to adequately care for and control the child. The evidence of any two experts, each of whom shall be either a physician and surgeon, certified either by the American Board of Psychiatry and Neurology or under Section 6750 of the Welfare and Institutions Code, or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, shall be required to support a finding under this subdivision. If, however, the parent or parents reside in another state or in a foreign country, the evidence required by this subdivision may be supplied by the affidavits of two experts, each of whom shall be either a physician and surgeon who is a resident of that state or foreign country, and who has been certified by a medical organization or society of that state or foreign country to practice psychiatric or neurological medicine, or by a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders and who is licensed in that state or authorized to practice in that country. If the rights of any parent are sought to be terminated pursuant to this subdivision, and the parent has no attorney, the court shall appoint an attorney for the parent pursuant to Section 237.5, whether or not a request for the appointment is made by the parent.

(7) *Person in supervised out-of-home placement for one year period.* Who has been in out-of-home placement under the supervision of the juvenile court, the county welfare department, or other public or private licensed child-placing agency for a one-year period, if the court finds that return of the child to the child's parent or parents would be detrimental to the child and that the parent or parents have failed during that period, and are likely to fail in the future, to maintain an adequate parental relationship with the child, which includes providing both a home and care and control for the child.

If the minor has been adjudged a dependent child of the juvenile court and placed in out-of-home placement pursuant to Section 361 of the Welfare and Institutions Code, the one-year period shall be calculated from the date of the dispositional hearing at which the child was placed in out-of-home placement pursuant to that section. If the minor is in placement under the supervision of a county welfare department or other public or private licensed child-placing agency, pursuant to a voluntary placement, as described in Section 16507.4 of the Welfare and Institutions Code, the one-year period shall be calculated from the date the minor entered out-of-home placement.

The court shall make a determination that reasonable services have been provided or offered to the parents which were designed to aid the parents to overcome the problems which led to the deprivation or continued loss of custody and that despite the availabilty of these services, return of the child to the parents would be detrimental to the child. The probation officer or social

worker currently assigned to the case of the child shall appear at the termination proceedings.

If the minor has been adjudged to be a dependent child of the court pursuant to Section 300 of the Welfare and Institutions Code, the court shall review and consider the contents of the juvenile court file in determining if the services offered were reasonable under the circumstances.

Trial placement of the child in the physical custody of the parent of visitation of the child with the parent during the one-year period when the trial placement or visitation does not result in permanent placement of the child with the parent, shall not serve to interrupt the running of the one-year period.

(8) *Minor found to be dependent child and reunification services not to be provided.* A minor who has been found to be a dependent child of the juvenile court and the juvenile court has determined, pursuant to paragraph (3), (4), or (5) of subdivision (b) of Section 361.5 of the Welfare and Institutions Code, that reunification services shall not be provided to the minor's parent or guardian.

(b) *Wishes and best interest of child; testimony of minor in chambers.* At all termination proceedings, the court shall consider the wishes of the child and shall act in the best interests of the child.

The testimony of the minor may be taken in chambers and outside the presence of the minor's parent or parents if the minor's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exist:

(1) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(2) The minor is likely to be intimidated by a formal courtroom setting.

(3) The minor is afraid to testify in front of his or her parent or parents.

After testimony in chambers, the parent or parents of the minor may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

The testimony of a minor also may be taken in chambers and outside the presence of the guardian or guardians of a minor under the circumstances specified in this subdivision.

(c) *Clear and convincing evidence.* A finding pursuant to this section shall be supported by clear and convincing evidence.

(d) *Nonapplication of § 5158.* Section 5158 shall not apply to proceedings pursuant to this section.

(e) *Nonapplication to dependent children of juvenile court on and after Jan. 1, 1989.* This section does not apply to minors adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360 on and after January 1, 1989, during the period in which the minor is a dependent child of the court. For those minors, Section 366.26 of this code and Section 7017 of the Civil Code provide the exclusive means for the termination of parental rights.

California Civil Code section 232.6.

Purpose of chapter; effect of declaration of freedom

The purpose of this chapter is to serve the welfare and best interests of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from his or her life. A declaration of freedom from parental custody and control pursuant to this chapter terminates all parental rights and responsibilities with regard to the child.

California Civil Code section 7002.

Application regardless of marital status of parents

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

California Welfare and Institutions Code Section 300.

[The following are dependent children within the Juvenile Court's jurisdiction. One:]

* * * *

(B) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.

* * * *

(D) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either

of his parents, or of his guardian or other person in whose custody or case he is.

(e) Who has been freed for adoption from one or both parents for 12 months by either relinquishment or termination of parental rights and for whom an interlocutory decree has not been granted pursuant to Section 224n of the Civil Code or an adoption petition has not been granted.